FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 12, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2003-149
ELK RUN COAL COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DECISION

BY THE COMMISSION:

This case involves a civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Elk Run Coal Company, Inc. ("Elk Run"), charging it with a violation of 30 C.F.R. § 75.220(a)(1), as a result of failing to comply with its roof control plan.[1] Administrative Law Judge Avram Weisberger affirmed the citation but determined that the violation was not the result of the operator's unwarrantable failure and that it was not significant and substantial ("S&S"). 26 FMSHRC 761, 762-69 (Sept. 2004) (ALJ). The Secretary of Labor filed a petition for review limited to the judge's S&S determination, and the Commission granted review. For the reasons that follow, we vacate the judge's decision on the S&S issue and remand the proceeding for further consideration.

[1] Section 75.220 provides in pertinent part:

> (a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

I.

Factual and Procedural Background

Elk Run operates the Black King I North Portal Mine, an underground coal mine located in Boone County, West Virginia. 26 FMSHRC 761. During July 2002, Elk Run was pillar mining in an area of the mine designated 013-014 MMU. *Id.* The area contained seven entries,[2] numbered one to seven, reading from left to right.[3] *Id.* The rows of pillars were designated by letters A to F (with A being the most inby row), and ran perpendicular to the entries. *Id.* Each row was comprised of six blocks of unmined coal, or pillars, numbered one to six, again reading from left to right *Id.* Each block was identified by referencing its location by row and seriatim order within that row; for example, in the first row the first block between the first and second entry is row A block 1p. *Id.* at n.1.

Elk Run utilized pillar mining in this section of the mine. On advance, the continuous miner mined seven entries on 55-foot centers and connecting crosscuts on 90-foot centers, 20-feet wide, leaving six unmined pillars standing in each row, each 70-feet long by 35-feet wide. Tr. 321, 350-52. Then, when the miner had advanced as far as it could go, it retreated by mining the pillars as it proceeded outby by "splitting the block," or mining through the center of the pillars with a 35-foot long and a 20-foot wide cut. Tr. 145, 165, 349-50. Elk Run used two continuous miners in the area, each operating from right to left.[4] 26 FMSHRC at 761. The left side miner usually mined in entries one to three,[5] while the right side miner mined in entries four through seven. *Id.* at 761-62. In a normal mining sequence, after the continuous miner completed the cutting of its assigned pillars in a row, it retreated and mined the next row outby. *Id.* at 762; Tr. 209.

Elk Run's approved roof control plan addressed several conditions in the mine pertinent to the instant proceeding. In specifying the sequence of pillar mining, the plan provided, "No more than 2 rows of blocks shall be started until inby blocks are completed." Gov't Ex. 4 at 11. In addition, the plan required that, once mining had been completed on a pillar inby, eight

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[2] An entry in coal mining generally serves as "a haulage road, gangway, or airway to the surface." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 188 (2d ed. 1997).

[3] A drawing of the relevant area of the mine was produced at trial and admitted into evidence. Tr. 42-44, 78; Gov't Ex. 2. A copy of the exhibit is attached.

[4] Gov't Ex. 2 shows only the left side miner, which is designated "CM." Tr. 66, 71-72, 101.

[5] In this area of the mine, the blocks between the first and second entries in all of the rows (designated 1p on Gov't Ex. 2) were not cut. Tr. 329.

breaker posts must be set in the entry in the next outby row. *Id.* at 19. According to MSHA inspector Danny Meadows, the posts served two purposes – impeding traffic to the area that had been mined and providing support for the roof once the roof had been weakened by the splitting of the pillars. Tr. 92-95. Nothing in the roof control plan required the operator to take a complete cut out of a pillar. Tr. 137.

During July 2002, Elk Run operated two production shifts: one in the day, which ran from 6:30 a.m. to 3:30 p.m., and one in the evening, which ran from 4:00 p.m. to 1:00 a.m. 26 FMSHRC at 762. In addition, a midnight maintenance shift, during which no coal was mined, generally started between 11:00 p.m. and midnight and lasted until 8:00 a.m. *Id.* On each production shift, the section foreman filled out the "Foreman's Production Report," which indicated where coal was being cut and the times at which mining began and ended in each cut. *Id.* at 764; Gov't Ex. 5. Entries on the report were made generally in the order in which the coal was mined. Tr. 229-30.

On July 23, MSHA inspector Meadows was at the mine to conduct a quarterly inspection. 26 FMSHRC at 762; Tr. 31-32. He first went to the mine office where he met with mine superintendent Gary Neil and examined the mine map and pre-shift books. Tr. 33-34. Meadows then went underground to inspect the pillar line, where he met day shift section foreman Phil Saunders. 26 FMSHRC at 762; Tr. 40-42. When Meadows arrived at the pillar line around 9:45 a.m., the left side miner was parked in the number 2 entry between rows C and D. 26 FMSHRC at 762. The left side miner was not mining any coal at that time, although a room off to the side of the number 1 entry had been mined earlier that morning. *Id.*; Tr. 258-259; Gov't Ex. 5 at 2. The right side miner was not mining any coal that day. Tr. 273.

Meadows and Saunders observed that, in row B, block 3p (identified as "f" on Gov't Ex. 2) and block 4p (identified as "e" on Gov't Ex. 2) had been mined through, as had blocks 5p and 6p. 26 FMSHRC at 762; Gov't Ex. 2. Also, in row B, block 2p (identified as "a" on Gov't Ex. 2) had been cut but not mined all the way through. 26 FMSHRC at 762. There were no timbers set in entry 2 outby row B. *Id.*

In row C, the only blocks that had been mined were block 5p, which was between the number 5 and 6 entries, and block 6p, which was between the number 6 and 7 entries. *Id.* In row D, block 6p, which was between the number 6 and 7 entries, was the only block that had been mined, and it had been cut all the way through. *Id.* The production report for the evening shift on July 22 indicated that the left side miner was out of service during some of the shift. Tr. 222; Gov't Ex. 5 at 1.

Around 10:00 a.m. that morning, Meadows issued a citation alleging a violation of 30 C.F.R. § 75.220(a)(1). The citation charged Elk Run as follows: "The operators (sic) roof control plan is not being complied with on the 013-014 MMU in that pillars are not being extracted as the plan requires. Three rows of blocks were started at the same time." Gov't Ex. 3.

The inspector designated the violation as S&S and charged that the violation occurred as a result of the operator's unwarrantable failure. *Id.*

Elk Run filed a notice of contest, and the case was assigned to a judge. The case proceeded to trial, and the judge subsequently issued a decision in which he affirmed the citation. The judge initially noted that the parties agreed that rows C and D had been started but not completed, and the central issue was whether the Secretary had established that Elk Run's cutting of block 2p in row B was incomplete. 26 FMSHRC at 762-63. On this point, the judge noted conflicts between the testimony of MSHA inspector Meadows and Elk Run foreman Saunders. The judge concluded that there was no evidence of any mining in rows B, C, or D during the morning of July 23, when Meadows issued the citation, and that by then Elk Run had determined that mining in row B was completed and there was no intent to go back and finish the cut in block 2p. *Id.* at 763-64. Contrary to Elk Run's position, however, the judge concluded that his inquiry was not limited to that morning, but rather he could find a violation if, at any time prior to the issuance of the citation, the record established that row B and the two outby rows, C and D, had been started but not completed. *Id.* at 763-64.

Because there was no testimony concerning the sequence of cutting or what Elk Run intended to do at the conclusion of the evening shift on July 22, the judge examined the Production Reports (Gov't Ex. 5) that were in evidence. 26 FMSHRC at 764. On July 22, the Foreman's Production Report indicated that the right side miner had completed cuts on blocks 6p and 5p (in row C) and block 6p (in row D).[6] *Id.*; Gov't Ex. 5 at 1. On the basis of the production reports and the fact that breaker posts "had not been set in Entry No. 2 row C outby row B block 2P," the judge concluded that it "might reasonably be *inferred* that, at the conclusion of the July 22 evening shift, row B had not been completed, . . . , and rows C and D had been started, but not completed." 26 FMSHRC at 764-65 & nn.5-6 (emphasis in original). The judge further noted that Elk Run failed to produce any probative evidence to rebut the inferences.[7] *Id.* at 765. Therefore, the judge concluded that at the end of the evening shift on July 22, row B had not been completed, and outby rows C and D had been started and not completed. *Id.* Accordingly, the judge found that Elk Run was in violation of its roof control plan and section 75.220(a). *Id.*

In examining the designation of the citation as due to Elk Run's unwarrantable failure, the judge noted foreman Saunders' prompt efforts to abate the violative condition. *Id.* at 767. On this point, the judge credited Saunders' testimony that he had ordered timbers to block the entry off shortly after he arrived in the section on the morning of July 23. *Id.* at 766-67 & n.7. He further noted the short duration during which the condition had existed. He also considered that Elk Run had not been placed on notice that greater efforts were necessary for compliance, that the degree

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[6] As the judge noted, the production report does not indicate the row in which the particular block listed in the report was located. 26 FMSHRC at 764 n.5. *See* Gov't Ex. 5.

[7] Ralph Williams, the section foreman on the evening shift, left his employment with Elk Run at the end of his shift on July 22 and moved to Alabama. Tr. 167, 203-04.

of danger caused by the violation was mitigated by its existence primarily during a non-production shift, and that there was no production in the area on the morning of July 23. The judge then concluded that the violation was not due to Elk Run's unwarrantable failure.[8] *Id.* at 767.

With regard to the S&S designation, the judge relied on the criteria in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The judge found that there was a violation of the roof control plan and section 75.220(a). 26 FMSHRC at 768. He further found that pillar mining weakens roof support and that by leaving three rows of blocks that had not been completed, Elk Run had exacerbated the problem. *Id.* He further noted that Elk Run's failure to install breaker posts to prevent any roof fall from continuing outby further contributed to the hazard. *Id.* Therefore, he concluded that the first and second elements of *Mathies* (the presence of an underlying violation of a mandatory safety standard and a discrete safety hazard contributed to by the violation, *Mathies*, 6 FMSHRC at 3-4) had been met. 26 FMSHRC at 768. In addressing the third element of *Mathies*, whether there was a reasonable likelihood that the hazard contributed to will result in an injury, the judge found that there was no evidence presented that the roof was undergoing any specific type of stress and that there was no evidence that the roof had ever fallen in this section of the mine. *Id.* at 768-69. The judge concluded that the Secretary had failed to establish that there was a reasonable likelihood of a roof fall and that the violation was not S&S. *Id.* at 769.

In assessing a penalty for the violation, the judge examined the penalty criteria and concluded that a penalty of $1,000 was appropriate. *Id.*

II.

Disposition

As noted above, the judge found that Elk Run violated its roof control plan, and the operator has not appealed that finding. The Secretary has, however, appealed the judge's adverse S&S determination, arguing that the judge erred, as a matter of law, in concluding that, because there was no evidence that the roof was undergoing any specific types of stress that could lead to a roof fall, there was not a reasonable likelihood that the hazard contributed to by the violation would result in an injury. PDR at 7-8.[9] The Secretary adds that she did present testimony credited by the judge that the violation made a roof fall reasonably likely because of the additional stress placed on the mine roof by pillar mining. *Id.* at 8-10. The Secretary further states that she presented evidence that specific stress on the roof was created because each time a pillar was mined in one of the three uncompleted rows, additional stress was placed on the roof of the mine. *Id.* at 10-13. The Secretary also argues that the judge erred in concluding that the violation was

[8] Neither the judge's finding of violation nor his unwarrantable failure determination is before the Commission on appeal.

[9] The Secretary designated her petition for discretionary review as her brief and submitted an additional citation of supplemental authorities ("Sup'l Br.").

not S&S by relying on the fact that there had not been a roof fall in this section of the mine. *Id.* at 14-15. Finally, the Secretary asserts that the judge erred by failing to address testimony demonstrating that Elk Run's failure to adhere to its roof control plan made it more likely that a roof fall would occur, creating a risk of a serious injury. *Id.* at 15-17. The Secretary concludes by requesting that the Commission vacate the judge's decision and remand the case back to the judge for application of the correct legal standard. *Id.* at 17-18.

In response, Elk Run argues that the judge's decision followed Commission precedent and is supported by substantial evidence. E.R. Br. at 6-7. It asserts that the judge properly rejected the testimony of the MSHA inspector because his opinions were not tied to any specific conditions of the mine but were general assertions of hazards. *Id.* at 7-8. Further, the operator argues that the Commission, in determining S&S, has considered the conditions surrounding a violation and the history of injuries associated with the type of violation at issue. *Id.* at 8. Elk Run also contends that the brief duration of the violation, primarily during the non-production shift, mitigated the degree of danger presented by the violation. *Id.* at 8-9. The operator states that the Secretary's position in the case is that she should be able to prove that an accident is reasonably likely to cause an injury through an inspector's opinion without presenting evidence to support it. *Id.* at 9. Elk Run concludes by asking the Commission to affirm the judge's decision. *Id.* at 10.

The requirement for each underground coal mine to develop a roof control plan is a fundamental directive of the Mine Act and its predecessor, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976). *See* 30 U.S.C. § 862(a) (setting forth general requirements for plans "to protect persons from falls of the roof or ribs."). The intent of this provision was "to afford comprehensive protection against roof collapse – the 'leading cause of injuries and death in underground coal mines.'" *UMWA v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989) (citations to legislative history omitted).[10]

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a

[10] "[T]hese plans were intended to be more comprehensive than uniform mandatory standards because in addition to a 'nucleus' [] of practices that are necessary to prevent roof collapse in any mine, they were to include whatever unique measures were necessary to address the unique attributes of a particular mine." 870 F.2d at 669 (emphasis omitted).

> mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

With regard to the first and second elements of the *Mathies* test – the judge's findings of a violation of the roof control plan and section 75.220(a)(1), and a discrete safety hazard, i.e., the hazard of a roof fall – are not in dispute. On the issue of a discrete safety hazard, the judge credited MSHA inspector Meadows' testimony that pillar mining weakens roof support and places stress on the section. The judge further noted that leaving three rows of blocks uncompleted exacerbates the hazard and the fact that breaker posts had not been installed to prevent any roof fall continuing outby further contributes to the hazard. 26 FMSHRC at 768.

With regard to the third element of *Mathies*, the judge initially noted the MSHA inspector's testimony concerning the dangers associated with retreat mining: "numerous people have been killed as a result of retreat mining." *Id.*[11] The judge also found that the presence of three incomplete rows without supporting timbers increases the risk of exposing miners to a roof fall. *Id.* However, the judge further found that there was "not any evidence adduced that the roof was undergoing any specific type of stress that could lead to a roof fall. Nor does the record contain evidence that the roof had ever fallen in this particular section of the mine." *Id.* at 768-69. The judge concluded that the Secretary had failed to establish by a preponderance of the evidence that *there was a reasonable likelihood of a roof fall*. *Id.* at 769 (emphasis added).

In *U.S. Steel*, the Commission addressed several defenses to the designation of a violation as S&S, including the operator's argument that its violation of a ventilation plan was not S&S because at the time of the violation the level of methane was low and not at explosive levels. In rejecting those defenses, the Commission explained that "the question [of whether the violation is S&S] must be resolved on the basis of the circumstances as they existed at the time the violation was cited and as they might have existed had normal mining operations continued." 7 FMSHRC at 1130. In a later case, the Commission further explained, "The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued." *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989).

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[11] The judge also stated in his unwarrantability determination, "As explained by Meadows, the hazard of a roof fall is inherent in pillar mining." 26 FMSHRC at 766.

Here, the judge clearly failed to examine the record evidence relating to the reasonable likelihood of injury during the operative time frame, examining instead the reasonable likelihood of a roof fall based solely on mine conditions prior to the violation. Thus, as part of the third element of *Mathies*, the judge imposed an affirmative obligation on the Secretary to prove that, prior to the violation, a roof fall had occurred or that adverse roof conditions existed that could have led to a roof fall. However, as the Commission has noted, "The third *Mathies* element requires the Secretary to establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *Bellefonte Lime Co., Inc.*, 20 FMSHRC 1250, 1254-55 (Nov. 1998). In concluding that the Secretary failed to carry her evidentiary burden by not presenting evidence of roof falls or stress on the roof, the judge erred. *See id.*

This is not to say that a history of roof falls in a mine is not pertinent to the consideration of the reasonable likelihood of an injury.[12] The Commission has long held that whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988).[13] However, conditions in the mine prior to the citation are not *dispositive* of the S&S designation.[14] *See also Buffalo Crushed Stone, Inc.*, 10 FMSHRC 2043, 2046 (Oct. 1994) (in considering whether the failure to provide a berm at a stockpile was S&S, the fact that the stockpiles were flat and that there were no equipment problems does not establish that an accident was not reasonably likely to occur).

We thus agree with the Secretary, Sup'l Br. at 1-2, that the absence of an injury-producing event when a cited practice has occurred does not preclude an S&S determination. *See Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998) (the Secretary does not have to show that a violation caused an accident in order to prove that a violation was S&S); *Buffalo Crushed Stone,* 10 FMSHRC at 2046 (the absence of previous instances of overtravel does not establish that an accident would not be reasonably likely to occur, given the nature of hazards presented). It

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[12] *See, e.g.*, *Lion Mining* Co., 18 FMSHRC 695, 699 (May 1996) (judge erred in failing to consider the history of roof falls in the area); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2012 (Dec. 1987) (history of unstable roof at mine considered in relation to S&S determination).

[13] As the Commission noted in *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997), "When evaluating the reasonable likelihood of a *fire, ignition, or explosion*, the Commission has examined whether a 'confluence of factors' was present based on the particular facts surrounding the violation," quoting *Texasgulf*, 10 FMSHRC at 501 (emphasis added). In contrast, no Commission case has required the Secretary to show adverse roof conditions in a mine as a prerequisite to finding that a violation of a roof control plan is S&S.

[14] Clearly, conditions in a mine created by a violation need not be so grave as to constitute an "imminent danger," which could reasonably be expected to cause death or serious injury before the condition can be abated. *National Gypsum*, 3 FMSHRC at 828. *Accord Enlow Fork*, 19 FMSHRC at 10 n.9.

follows then, as the Secretary argues, that the absence of evidence of stress or prior roof falls cannot be determinative of whether the cited condition is reasonably likely to cause an injury. *See also Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996) (operator's assertions that it had no history of accidents and that equipment had been driven for many months in cited condition is not dispositive of S&S determination).

In the instant proceeding, the presence of adverse roof conditions may increase the likelihood of a roof fall but the absence of such adverse conditions does not necessarily eliminate the possibility that a roof fall might occur when an operator fails to follow its roof control plan. Moreover, requiring the Secretary to prove an S&S violation by establishing that the mine roof is under "any specific type of stress that could lead to a roof fall," 26 FMSHRC at 768-69, places an onerous burden of proof on the Secretary. Similarly, any implication that the Secretary needs to show that there had been a roof fall in this section of the mine before a violation can be designated S&S would unreasonably restrict the ability of the Secretary to prove that a roof control violation is S&S. None of these evidentiary points detracts from the existing core requirement that a roof control plan take into account the specific conditions of the mine in seeking to prevent roof fall accidents[15] and the Congressional intent to provide comprehensive protection against roof falls through adherence to MSHA-approved safety measures tailored to the individual mine.

We find that the judge erred by grounding his S&S determination solely on the Secretary's failure to prove adverse roof conditions prior to the violation, while failing to address the remainder of the evidentiary record. On remand, therefore, the judge must weigh the record evidence and, assuming that normal mining were to continue, determine whether any miner on any shift would have been exposed to the hazard arising out of the violation, so as to create a reasonable likelihood of injury.

The judge also made findings elsewhere in the decision that are inconsistent with his conclusion with regard to S&S. In his penalty determination, the judge found that the violation contributed to the hazard of a roof fall which could have caused serious injury to miners. There, the judge concluded that "the gravity of the violation was relatively high." 26 FMSHRC at 769. In a similar case, in which the judge found that the gravity of the violation was high, the Commission, in vacating and remanding the judge's determination that a violation was not S&S, explained, "Although the gravity penalty criterion and a finding of S&S are not identical, they are frequently based upon the same factual circumstances." *Enlow Fork*, 19 FMSHRC at 10-11, *citing Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987). Here, the judge failed to reconcile his finding of high gravity with his determination that the violation was not S&S. *Enlow Fork*, 19 FMSHRC at 11. *See also Youghiogheny & Ohio*, 9 FMSHRC at 2013. Therefore, a remand is also necessary to resolve this internal inconsistency.

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[15] MSHA regulations require that the criteria in a mine's roof control plan which set forth roof control practices address the unique conditions of the mine. *See* 53 Fed. Reg. 2354, 2369-70 (Jan. 27, 1988) (streamlining MSHA's Roof Control Standards, 30 C.F.R. Part 75).

Finally, Elk Run contends that the violation was of brief duration and occurred primarily during a non-production shift, thereby mitigating the danger posed by three uncompleted rows. E.R. Br. at 8-9. It is apparent that the violation existed for some period on the evening shift on July 22 and during the morning shift on July 23 in addition to its duration through the entire maintenance shift. Moreover, the third, uncompleted, inby row in which the partial cut had been taken on block 2p (designated as "a" on Gov't Ex. 2) remained accessible to *all* miners because breaker posts had not been set. *Compare Youghiogheny & Ohio*, 9 FMSHRC at 2013 (no S&S where danger signs were posted at the entrance to rooms where roof control violations occurred) *with Halfway, Inc.*, 8 FMSHRC 8, 12-13 (Jan. 1986) (S&S found because the cited area remained accessible and travelways to the area would be used by miners). We reject Elk Run's argument to the extent that it suggests that miners on the maintenance shift were less exposed to the potential hazards than those on the production shifts.[16] *See also Bellefonte Lime*, 20 FMSHRC at 1255 (contrary to the judge's finding, S&S allegation not ameliorated by short term exposure of miners to the cited hazard).

Because the judge failed to address comprehensively the record testimony (Tr. 93-103), consistent with Commission precedent to determine whether the Secretary established a reasonable likelihood that an injury would occur, a remand is necessary.[17] *See Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992).

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[16] The question surrounding the duration of the violation goes to the matter of whether Elk Run "promptly" set the breaker posts, as the roof control plan required.

[17] Commissioner Jordan notes that the judge's examination of inspector Meadows' testimony, (Tr. 93-103), should include a review of the inspector's statements regarding the danger of having three open rows and pulling support out from a miner who is inby (Tr. 98) and the particular danger to the left side continuous miner operator (Tr. 99-101).

Commissioner Suboleski, with Chairman Duffy's concurrence, notes that the judge, on remand, must analyze the record facts relating to the violation at this mine, as well as the MSHA inspector's general testimony concerning the dangers of retreat mining. With regard to roof control, the issue is not the hazards of pillar mining – Elk Run was permitted to recover pillars under its roof control plan; rather, it is about whether an additional hazard, sufficient to meet the *Mathies* criterion, was introduced by the manner in which the pillars were mined. In this regard, if mining is completed on pillar 6p in row D to the right of the sixth entry, the roof control plan does not require that breaker posts be set in any other entry (entries five, four, three, two, or one). Thus, upon mining the pillar 6p, in row D, the plan clearly does not require that any breaker posts be set to assist support in entry 2, row B. Further, only a partial cut of 10 feet was taken out of pillar 2p, and the MSHA inspector testified that breaker posts would not have been needed in entry 2, outby row B, if the third row had not been started. Tr. 151. The judge must also consider that, upon completion of the cut in row B on pillar 2p, the roof control plan requires Elk Run to set the breaker posts "promptly."

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision regarding S&S and remand the issue to the judge for further consideration and, if necessary, for reassessment of the penalty.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

The attached Government Ex. 2 is not available the electronic version of the decision.

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